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A Comment on the Litigation Strategy, Judicial Politics and Political Context Which Produced *Grutter* and *Gratz*

BY SHERYL G. SNYDER*

INTRODUCTION

In 2003, the nation commemorated the fortieth anniversary of Dr. Martin Luther King's "I Have a Dream" oration and the terrorist bombing of the Sixteenth Street Baptist Church in Birmingham, Alabama. Both of these anniversaries reminded many people that they came of age politically in Kentucky's Jim Crowe era. They attended de jure segregated elementary schools, and the resulting de facto segregation was not addressed for a decade after *Brown v. Board of Education*¹ was decided. The Civil Rights Act of 1964 coincided with their first election.

The chronological proximity of those experiences is the prism through which many people view the contention that American society has become sufficiently color-blind and that affirmative action is obsolete. The interval between *Brown v. Board of Education* and present day is about the same as the interval between Appomattox and *Plessy v. Ferguson*.² While great progress has been made toward equal opportunity in American society, the vestiges of the Civil War, and its causes, are still prevalent. To paraphrase William Faulkner, in the South, the past is not history, it's not even the past.³

Supreme Court decisions are rarely rendered in a political vacuum. The nation's social and political agendas often affect which cases reach the Supreme Court's docket as well as their outcome. This was certainly true

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¹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

² *Plessy v. Ferguson*, 163 U.S. 537 (1896).

³ WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951) ("The past is never dead. It's not even past.").

of the Supreme Court's recent affirmative action decisions in *Grutter*⁴ and *Gratz*.⁵ The first section of this Comment explores how the social and political climate might have affected the Supreme Court's decision in *Grutter*.⁶ Then, this Comment discusses the judicial politics surrounding this case and how the issue divided the Sixth Circuit.⁷ Finally, this Comment discusses the judicial politics in the Supreme Court surrounding the *Grutter* case.⁸

I. SOCIAL AND POLITICAL CLIMATE

In Kentucky, people have become inured to letters-to-the-editor from the political fringe rearguing that the cause of the Civil War was about "states rights," and not slavery. The year 2003 saw the nadir of this debate, when *The Courier-Journal* published a lengthy essay by Circuit Judge Bill Cunningham, a published historian,⁹ criticizing the nascent effort to remove the statue of Jefferson Davis from the Capital rotunda in Frankfort.¹⁰ Judge Cunningham argued that slavery was a less important cause of the Civil War than a continuation of the Federalist and Anti-federalist debates on the ratification of the Constitution of the United States.¹¹ His argument was

⁴ *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (upholding the University of Michigan Law School's affirmative action program).

⁵ *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (discussing the constitutionality of the University of Michigan's affirmative action program in undergraduate admissions).

⁶ See discussion *infra* Part I.

⁷ See discussion *infra* Part II.A.

⁸ See discussion *infra* Part II.B.

⁹ Judge Cunningham has written two published history books. See BILL CUNNINGHAM, *ON BENDED KNEES: THE NIGHT RIDER STORY* (1987); BILL CUNNINGHAM, *CASTLE: THE STORY OF A KENTUCKY PRISON* (Gloria Stewart ed., 1995).

¹⁰ Bill Cunningham, *Jefferson Davis: Beyond a Statue-tory Matter; Has Ignorance over Civil War's Issues Hurt the Dialogue?*, *COURIER-J.* (Louisville, Ky.), July 27, 2003, at D1.

¹¹ *Id.* at D1. Judge Cunningham stated:

... The Federalists were for a strong and central government; the Anti-Federalists were for preserving not only the sovereignty, but also the supremacy of state governments, believing that since they were the closest to the people they would be most responsive to their needs and least likely to take away their freedoms.

This sharp disagreement threatened a rejection of the new Constitution.

....

soon refuted by Professor John T. Cumbler, a professional historian. Professor Cumbler argued that slavery was so integral to the antebellum South's economic system that even southerners who were not slave owners were willing to go to war to defend it.¹² This exchange, delating slavery's role as a cause of the Civil War, while delating current political symbolism, is an example of race and related issues continuing in the forefront of social and political discussion in 2003.¹³ Additionally, several race-related events attracted the news media's attention.

A. Issues of Race in the News Media

In 2003, the battle in Georgia over the state flag and the fallout from Trent Lott's comments about Strom Thurmond received almost as much coverage as the Supreme Court's decisions in *Grutter* and *Gratz*.

An important political battle was fought in Georgia about the state flag that was adopted in 1956 as a symbol of Georgia's defiance after *Brown v. Board of Education*¹⁴ was decided. Despite the fact that Atlanta emerged as the economic capital of the New South by embracing the Civil Rights movement, and thereby becoming the southern headquarters of the national news media's coverage of the movement during the 1960s,¹⁵ the flag, which incorporated the Confederate rebel cross, flew over the state capital building until 2001. When Governor Barnes persuaded the Georgia legislature to adopt a new state flag in 2001, he faced a crushing re-election defeat in 2002. Furthermore, the adoption of a new flag resulted in the defeat of U.S. Senator Max Cleland, which was critical because it provided

While the anti-slavery movement was growing in the South as well as the North, it was still considered by Southerners as a local issue, not subject to the intervention by the federal government. The secessionist movement was misguided, foolish and reckless, led mostly by unrelenting hotheads and wealthy planters; but in the end, the War Between the States was simply a bloody eruption of the lingering feud between the Federalists and the Anti-Federalists.

Id.

¹² John T. Cumbler, *Not About States Rights*, COURIER-J. (Louisville, Ky.), Aug. 3, 2003, at D4. See CHARLES P. ROLAND, AN AMERICAN ILIAD, THE STORY OF THE CIVIL WAR (1991); MARSHALL L. DEROSA, THE CONFEDERATE CONSTITUTION OF 1861, AN INQUIRY INTO AMERICAN CONSTITUTIONALISM (1991).

¹³ See discussion *infra* Part I.A.

¹⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁵ TAYLOR BRANCH, PARTING THE WATERS, AMERICA IN THE KING YEARS, 1954-63 (1988).

the second Bush administration with a new, single-vote, Republican majority in the United States Senate in 2003. When new Governor Perdue retracted his campaign promise and proposed a new state flag with the less divisive Confederate “stars and bars,” the debate over these symbols of the Civil War received a great amount of press coverage.¹⁶

Another race-related event which created a media frenzy occurred in the United States Senate. When the Republican Senate majority took control in 2003, Mississippi Senator Trent Lott was named as Majority Leader. He was quickly forced to relinquish his position as Majority Leader when he praised Senator Strom Thurmond’s 1948 Dixiecrat Presidential campaign.¹⁷ Within days after *Grutter* and *Gratz* were decided, Senator Thurmond passed away. His obituary contained a reprint of the 1956 Southern Manifesto condemning the decision in *Brown v. Board of Education*.¹⁸ In 1954, Senator Thurmond argued that the Supreme Court justices, “with no legal basis for their action, undertook to exercise their naked judicial power and substituted their personal and political ideas for the established law of the land.”¹⁹ Ironically, the same political polemics were uttered the week Thurmond died by the critics of *Grutter* and *Gratz*.²⁰

B. Issues of Race before the Supreme Court

Legal issues related to race were also prominent in the Supreme Court’s October 2002 term. In addition to the affirmative action cases, the Supreme Court decided cases concerning a Ku Klux Klan cross burning²¹ and the impact of the Voting Rights Act of 1965 on legislative redistricting.²²

Indeed, “states rights” were an issue during the 2002 term. For years, Chief Justice Rehnquist had advanced a constitutional doctrine of feder-

¹⁶ See, e.g., *Legislators in Georgia Act on Change to State Flag*, N.Y. TIMES, Apr. 5, 2003, at A9.

¹⁷ Adam Nagourney & Janet Elder, *Divisive Words: The Parties; National G.O.P. Members Weigh Against Lott in Poll*, N.Y. TIMES, Dec. 20, 2003, at A37.

¹⁸ Adam Clymer, *Strom Thurmond, Foe of Integration, Dies at 100*, N.Y. TIMES, June 27, 2003, at A1.

¹⁹ *Id.*

²⁰ See Linda Greenhouse, *The Supreme Court: Affirmative Action; Justices Back Affirmative Action by 5 to 4, but Wider Vote Bans a Racial Point System*, N.Y. TIMES, June 24, 2003, at A1.

²¹ *Virginia v. Black*, 123 S. Ct. 1536 (2003).

²² *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003).

alism that the Civil War Amendments sought to render obsolete.²³ Rehnquist expressly relied upon the *Civil Rights Cases*, which eviscerated the Reconstruction-era civil rights laws to diminish the power of the modern federal government.²⁴ It seemed that Rehnquist's objective was nothing less than to erode the constitutional basis for the Civil Rights Act of 1964 and the Voting Rights Act of 1965,²⁵ until a bare majority thwarted his momentum. Rehnquist voted with the majority in *Nevada Department of Human Resources v. Hibbs*,²⁶ apparently to be able to write the opinion himself and thereby circumscribe its scope.

The Supreme Court dealt with a Ku Klux Klan cross burning this term in *Virginia v. Black*.²⁷ In *Black*, the leader of a Ku Klux Klan rally had been convicted of violating Virginia's prohibition against cross burning. In her plurality opinion, Justice Sandra Day O'Connor surveyed the history of the Ku Klux Klan from its founding during the Reconstruction period, and concluded that "burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan."²⁸ The Court held that, because cross burning could be protected under the Constitution as symbolic speech in some circumstances, Virginia's presumption that burning a cross was done with the intent to intimidate was unconstitutional.²⁹ The Court did hold, however, that the "First Amendment permits

²³ See GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY* (2001); *THE FOURTEENTH AMENDMENT: CENTENNIAL VOLUME* (Bernard Schwartz ed., 1970).

²⁴ See *United States v. Morrison*, 529 U.S. 598, 601-02 (2000) (citing *The Civil Rights Cases*, 109 U.S. 3 (1883)); see also *The Slaughterhouse Cases*, 83 U.S. 36 (1873); C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (1951).

²⁵ See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); see also Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57 (2000); Julie Goldschild, *United States v. Morrison and The Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 *CORNELL L. REV.* 109 (2000).

²⁶ See *Nev. Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972 (2003) (holding that State employees may recover money damages for a state's failure to comply with the FMLA but that Congress may not "substantively redefine the state's legal obligations"). *Id.* at 1977.

²⁷ *Virginia v. Black*, 123 S. Ct. 1536 (2003).

²⁸ *Id.* at 1544.

²⁹ *Id.* at 1551.

Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation.”³⁰

Few would have predicted the Court’s holding in *Black* in light of the Court’s decision in *R.A.V. v. St. Paul*,³¹ as Justice Stevens noted in his concurrence.³² Indeed, the news media widely reported that the outcome in the “cross burning case” had been determined by the passionate personal statements made during oral argument by the normally taciturn Clarence Thomas, the only African-American on the Court.³³ Justice Thomas dissented from the holding that cross burning was not *prima facie* evidence of intent to intimidate.

Justice Thomas brought to bear his experience as a young African-American coming of age in the segregated South in his dissent in *Black*. His experience was that “cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.”³⁴ While his dissent in *Black* may have impacted Justice O’Connor’s plurality opinion in *Grutter*, Justice Thomas’ visceral comprehension of cross burning stands in stark contrast to the equally visceral aversion to affirmative action expressed in his dissent in *Grutter*.³⁵

Race as a political issue was also evident in *Georgia v. Ashcroft*,³⁶ which involved the use of race in legislative redistricting under the Voting Rights Act of 1965. As minorities gained genuine political power in the southern and border states, legislative reapportionment presented the opportunity to create super-majority/minority districts to increase the number of minority members of state legislatures. Under the banner of

³⁰ *Id.* at 1549.

³¹ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

³² *Black*, 123 S. Ct. at 1552 (Stevens, J., concurring).

³³ See Bill Keller, *Mr. Diversity*, N.Y. TIMES, June 28, 2003, at A15. Keller stated:

During oral argument last December, for example, he startled the chamber with a rare outburst against the symbolic terror of cross-burning, which may well have influenced the court [sic] to rule that states can ban the practice. You can question how heavily personal narrative should weigh in deliberations on the law—and you might well prefer Thurgood Marshall’s life wisdom to Clarence Thomas’s ferocious self-doubt—but as a general rule it seems to me our legal system is more human, and more humane, if the cold logic of the law is warmed by a rich variety of experience.

Id.

³⁴ *Black*, 123 S. Ct. at 1536.

³⁵ *Grutter*, 123 S. Ct. at 2362 (Thomas, J., dissenting).

³⁶ *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003).

“reverse discrimination,” these super-majority districts were attacked as violations of the Fourteenth Amendment.³⁷ The aggregation of minority voters into super-majority/minority districts also produced “bleached white districts,” which played a significant role in the Republican takeover of the United States House of Representatives in 1994. This was the culmination of Nixon’s “Southern Strategy” of 1968.

Intent upon keeping the “bleached white districts,” the Reagan-Bush Justice Department refused to preclear under Section 5 of the Voting Rights Act of 1965³⁸ any state legislative redistricting plan that reduced the overwhelming majority of minority voters in super-majority/minority districts.³⁹ Consequently, when Democratic majorities in southern state legislatures attempted to create more “influence districts” by moving blacks from super-majority/minority districts to districts in which a coalition of minority voters and like-minded voters would more likely elect representatives sympathetic to minority interests, the Justice Department refused to preclear the redistricting plans.

In a 5-4 decision handed down three days after the opinions in *Gratz v. Bollinger* and *Grutter* were announced, with Justice O’Connor again writing for the majority, *Georgia v. Ashcroft* held that unpacking the most heavily concentrated super-majority/minority districts to create a number of new influence districts was not a retrogression of minority voting strength preventing preclearance under Section 5. Not without irony, the four dissenting justices in *Georgia v. Ashcroft* joined Justice O’Connor to forge the majority in *Grutter*.

In the peroration to her majority opinion in *Georgia v. Ashcroft*, Justice O’Connor wrote:

While Courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as

³⁷ See *Shaw v. Reno*, 509 U.S. 630 (1993); see also *Miller v. Johnson*, 515 U.S. 900 (1995).

³⁸ 42 U.S.C. § 1973(c) (2003).

³⁹ *Ashcroft*, 123 S. Ct. at 2503. Before a redistricting plan can be enacted, Section 5 requires that before a covered jurisdiction’s new voting “standard, practice, or procedure” goes into effect, it must be precleared by either the Attorney General of the United States or a federal court to ensure that the change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”

Id. at 2503 (quoting 42 U.S.C. § 1973(c)).

properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life.⁴⁰

Likewise, proponents of affirmative action contend it is equally designed to "encourage the transition to a society . . . where integration and color-blindness . . . are simple facts of life."⁴¹ To the proponents of affirmative action, color consciousness is a means to attain the desired end of a color-blind society. As Judge John Minor Wisdom wrote at the zenith of the Civil Rights movement in the South:

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based in race. In that sense, the Constitution is color blind.

But, the Constitution is color-conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governing purpose.⁴²

That dichotomy reached the United States Supreme Court in 1978 in *Regents of the University of California v. Bakke*.⁴³ Unlike the racial redistricting cases, however, which had frequently been on the Court's docket in the 1990s, it would be twenty-five years after *Bakke* before the Supreme Court would again consider affirmative action in higher education in *Grutter* and *Gratz*. Meanwhile, the various circuit courts were grappling with the issue.

II. JUDICIAL POLITICS

A. *Judicial Politics in the Circuit Courts*

Prior to the Supreme Court's decision in *Grutter*, the trend among the circuit courts was to eliminate affirmative action programs. For example, the Fifth and Eleventh Circuits invalidated affirmative action plans at the

⁴⁰ *Ashcroft*, 123 S. Ct. at 2517.

⁴¹ *Id.*

⁴² *United States v. Jefferson County Bd. of Educ.*, 417 F.2d 834, 876 (5th Cir. 1966).

⁴³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

University of Texas⁴⁴ and University of Georgia,⁴⁵ respectively. However, not all of the circuits followed the trend. Specifically, the Ninth Circuit upheld the University of Washington's admissions policies.⁴⁶ The Sixth Circuit Court of Appeals also went against the developing trend when it held that the affirmative action program at the University of Michigan Law School was valid.⁴⁷

In 2001, two cases, *Gratz v. Bollinger*⁴⁸ and *Grutter v. Bollinger*,⁴⁹ were pending in federal district courts in Michigan. *Grutter*, often referred to as the "Michigan Law School case," reached the Sixth Circuit before the undergraduate case. The district court in Detroit entered a declaratory judgment stating "that the University of Michigan Law School's use of race in its admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964."⁵⁰ Concurring with the Fifth and Eleventh Circuits, the district court concluded that the diversity rationale of Justice Powell's separate opinion in *Bakke* was not a controlling Supreme Court precedent.⁵¹

The Sixth Circuit reversed the district court's holding. In a 5-4 decision, the Sixth Circuit held that "Justice Powell's opinion is binding on this Court under *Marks v. United States*, and because *Bakke* remains the law until the Supreme Court instructs otherwise, we reject the district court's conclusion and find that the Law School has a compelling interest in achieving a diverse student body."⁵² The court concluded that the Michigan law school admissions policy was narrowly tailored to attain the

⁴⁴ See *Hopwood v. Texas*, 78 F.3d 932, 943-45 (5th Cir. 1996). After the decision in *Grutter*, Texas proclaimed itself freed from the *Hopwood* decision and ready to reinstitute affirmative action. Anita Chang, *University of Texas Will Put Race Back in Admissions Policy*, COURIER-J. (Louisville, Ky.), June 28, 2003, at A12.

⁴⁵ See *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001).

⁴⁶ See *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000).

⁴⁷ See *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2001) (en banc), *aff'd*, 123 S. Ct. 2325 (2003).

⁴⁸ *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001).

⁴⁹ *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

⁵⁰ *Id.* at 872.

⁵¹ The district court also quoted *United States v. City of Miami*, 614 F.2d 1322, 1337 (5th Cir. 1980) ("We frankly admit that we are not entirely sure what to make of the various *Bakke* opinions. In over 150 pages of the United States Reports, the Justices have told us mainly that they have agreed to disagree.").

⁵² *Grutter*, 288 F.3d at 739 (citation omitted).

compelling state interest in a diverse student body, the Sixth Circuit upheld its affirmative action policy.

The Sixth Circuit's decision created a split in the circuits, enhancing the likelihood certiorari would be granted. However, while creating the split in circuits, *Grutter* created a public split among members of the court itself.

Judge Danny Boggs, in a dissenting opinion which displayed his erudition, condemned the term "affirmative action" as Orwellian, and deprecated the goal of diversity "as a proxy for race itself"⁵³ because it does not seek "true experiential diversity."⁵⁴ That paled in comparison to the "Procedural Appendix" attached to Judge Boggs's dissenting opinion.⁵⁵

Then-Chief Judge Martin, and now-Chief Judge Boggs, have offices just a few doors apart in Louisville, but their political backgrounds are quite different. Judge Martin apprenticed in the political spawning grounds of the Jefferson County Attorney's Office before being appointed to the state trial bench. His meteoric rise in the Kentucky judiciary included serving as the first Chief Judge of the newly created Kentucky Court of Appeals in 1976, followed swiftly by President Carter appointing him to the Sixth Circuit in 1979. Judge Martin is known for his immense interpersonal skills, but he also possesses a keen legal intellect. On the other hand, Judge Boggs, who was appointed to the Sixth Circuit by President Reagan without having previously served in any judicial or elected political office, is more renowned for his intellect than his political skills.

In his dissent, Judge Boggs bluntly accused Chief Judge Martin of manipulating the court's internal procedures so that the en banc hearing occurred after two conservative Republican judges had retired.⁵⁶ According

⁵³ *Id.* at 792 (Boggs, J., dissenting).

⁵⁴ *Id.* at 791 (Boggs, J., dissenting).

⁵⁵ *See id.* at 810-15 (Boggs, J., dissenting).

⁵⁶ *See id.* at 810-13 (Boggs, J., dissenting). Charting the procedural history of the case, Judge Boggs also noted that a prior procedural issue had been heard by a three-judge panel composed of Judges Daughtrey, Moore, and Stafford, a visiting senior judge from the Northern District of Florida, in *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999). Judge Boggs noted that, under the court's "must panel" internal procedures, subsequent proceedings in the same case would have been first assigned to that panel to decide whether the matter should be submitted to that panel or reassigned at random to a new panel. *Id.* at 811. Since the original panel included a Senior District Judge, the two remaining members of the panel should have decided whether to retain the Senior District Judge on the panel or have an additional regular judge assigned at random. Sixth Circuit Internal Operating Procedure 34b(2). Judge Boggs asserted that "[t]hese procedures were not followed

to Judge Boggs, Chief Judge Martin assigned himself to the three-judge panel, rather than choosing the third member of the panel at random.⁵⁷ A petition asking for an en banc hearing in the first instance was filed on May 14, 2001, but Judge Boggs asserted it was not circulated to the entire court until after two Reagan appointees—Judges Norris and Suhrheinrich—had retired, causing Judge Boggs to conclude that “it is impossible to say what the result would have been had this case been handled in accordance with our long-established rules.”⁵⁸

Judge Boggs’s “Procedural Appendix” elicited a response from Karen Nelson Moore, a member of the original three-judge panel. Judge Moore concluded that “[t]he only reason that ‘it is important [to place the Procedural Appendix] in the record’ is to declare publicly the dissent’s unfounded assertion that the majority’s decision is the result of political maneuvering and manipulation.”⁵⁹ Judge Moore proceeded “to present an accurate account of the events in question[, because] to fail to do so would create the impression that Judge Boggs’s assertions are, in fact, correct.”⁶⁰

in this case” because Chief Judge Martin assigned himself to the panel and the panel retained jurisdiction over the main appeal in *Grutter*, 288 F.3d at 811 (Boggs, J., dissenting).

⁵⁷ *Grutter*, 288 F.3d at 811 (Boggs, J., dissenting).

⁵⁸ *Id.* at 814 (Boggs, J., dissenting). See also FED. R. APP. P. 35(b)(1)(B).

⁵⁹ *Grutter*, 288 F.3d at 752-53 (Moore, J., concurring).

⁶⁰ *Id.* at 754 (Moore, J., concurring). Postulating that “[d]issenting opinions . . . present[ing] principled disagreements with the majority’s holding . . . are perfectly legitimate and do not undermine public confidence” in the court, Judge Moore delivered an eloquent critique of Judge Boggs’s decision to publicly air the court’s allegedly dirty linen. She stated:

Because we judges are unelected and serve during good behavior, our only source of democratic legitimacy is the perception that we engage in principled decision-making

The decisions of this court are not self-executing but instead must be carried into practice by other actors. They will do so only as long as they regard us as legitimate, as we possess neither the purse nor the sword, but only judgment. For this reason, we are often described as the weakest branch, but a court without purse, sword, or legitimacy would be weaker still. This is not to argue that protecting the relative strength of the judicial branch should be our primary concern. Indeed, we have all sworn to uphold the Constitution and the Nation needs a strong judiciary to check the occasional excesses of the other branches and, more importantly, to preserve the rule of law.

Our ability to perform these crucial tasks is imperiled when members of this court take it upon themselves to “expose to public view” disagreements of procedure. The damage done by such exposés is, at least in part, the

Judge Moore concluded that, even if the en banc petition had been presented to the full court sooner, the en banc hearing would not have occurred until “after Judges Norris and Suhrheinrich took senior status, on July 1 and August 15, 2001, respectively.” She also noted that an en banc initial hearing, as distinguished from a rehearing en banc, is virtually unknown in the Sixth Circuit and, if *Grutter* had been heard initially by Judges Martin, Daughtrey, and Moore, and a rehearing en banc had then been granted, the en banc hearing would also have occurred after the retirement of Judges Norris and Suhrheinrich.

Judge Moore concluded that Judge Boggs’s “primary complaint is with the outcome of the present case rather than with the procedures that were followed in arriving at that outcome.”⁶¹ Judge Moore lamented that Judge Boggs’s “Procedural Appendix” “will irreparably damage the already strained working relationships among the judges of this court.”⁶²

Circuit Judge Clay also deemed it essential to respond to Judge Boggs’s “Procedural Appendix” and stated:

Although the dissent’s substantive attack, which is grounded in neither fact nor law, is disturbing, the dissent’s procedural attack, as set forth in its “Procedural Appendix,” constitutes an embarrassing and incomprehensible attack on the integrity of the Chief Judge and this Court as a whole. Apparently, the dissent’s strategy in this regard is that if its substantive basis for disagreement with the majority opinion is not convincing, then questioning the procedural posture of this case will be enough to forever cast doubt upon the outcome reached here today. This unfortunate tactic has no place in scholarly jurisprudence and certainly does not deserve to be dignified with a response. However, because of the magnitude of the issues involved, and because of the baseless nature of the allegations, this procedural attack cannot go unanswered.⁶³

responsibility of those who report them, despite the efforts of Judge Boggs and those joining his opinion to disclaim responsibility for their own conduct. It is understandable, however, that they do so, as their conduct in the present case is nothing short of shameful.

Id. at 752-53 (Moore, J., concurring). Judge Moore also stated that she believed that “Judge Boggs and those joining his opinion have done a grave harm not only to themselves, but to this court and even to the Nation as a whole.” *Id.* at 752 (Moore, J., concurring).

⁶¹ *Id.* at 758 (Moore, J., concurring).

⁶² *Id.* (Moore, J., concurring); see *Cooley v. Bradshaw*, 338 F.3d 615 (6th Cir. 2003) (en banc); *Tesmer v. Granholm*, 333 F.3d 683 (6th Cir. 2003) (en banc).

⁶³ *Grutter*, 288 F.3d at 772.

Judge Clay emphasized the contradiction between Judge Boggs's "Procedural Appendix" and his criticism of Judge Damon J. Keith for revealing in *Memphis Planned Parenthood v. Sunquist*⁶⁴ that rehearing en banc had been denied on a 7-7 tie vote. "Like many of the assertions made in his dissent as a whole, Judge Boggs' renouncement of secrecy and claim that his procedural appendix 'legitimizes' the Court, are hollow, particularly in light of his position in *Memphis*. Indeed, it was 'secrecy' for which Judge Boggs so vehemently argued in *Memphis*."⁶⁵

Conversely, Judge Batchelder filed a one-paragraph dissent for the sole purpose of concurring "in all of [Judge Boggs's] dissent, including the exposition of the procedural history of the case."⁶⁶ This apparently prompted Judge Moore to include in her concurrence a quotation from Judge Batchelder's separate opinion in *Memphis* criticizing Judge Keith for "publicly impugning the integrity of his colleagues."⁶⁷ As Judge Moore wrote, this exchange of vitriol clearly "marks a new low point in the history of the Sixth Circuit."⁶⁸

⁶⁴ *Memphis Planned Parenthood v. Sunquist*, 184 F.3d 600 (6th Cir. 1999).

⁶⁵ Fellow Kentuckian, Judge Eugene Siler, wrote a one paragraph dissent in which he joined Judge Boggs's dissent on the merits, but wrote separately to voice his disagreement with the "Procedural Appendix." Judge Siler noted that the appendix was "unnecessary for the resolution of this case," and had unnecessarily exposed the fissures in the court by causing the separate opinions of Judges Moore and Clay. *Grutter*, 288 F.3d at 815 (Siler, J., dissenting).

⁶⁶ *Id.* (Batchelder, J., dissenting).

⁶⁷ *Id.* at 753 (Moore, J., concurring).

⁶⁸ *Id.* at 758 (Moore, J., concurring). A conservative interest group, Judicial Watch, filed a misconduct complaint against Chief Judge Martin with the United States Judicial Conference. Judge Boggs's dissent was used on the floor of Congress to denigrate the Sixth Circuit's decision in *Grutter* as it moved toward the Supreme Court. CNN, *Review: Judge Exerted Influence in Affirmative Action Case*, <http://www.cnn.com/2003/LAW/06/06/affirmative.action.ap/index.html> (on file with author). The Judicial Council of the Sixth Circuit ruled in August, 2003, that the ethics complaint was moot. Adam Liptak, *Order Lacking on a Court: U.S. Appellate Judges in Cincinnati Spar in Public*, N.Y. TIMES, Aug. 12, 2003, at A10. But exposing the internal workings of the Sixth Circuit has continued. In an August, 2003, en banc decision in a death penalty case, Judge Boggs published a draft opinion of the panel to prove his contention that the panel would have decided the case differently than the en banc court. *Cooey v. Bradshaw*, 338 F.3d 615, 617-23 (6th Cir. 2003). Again, Judge Clay rejoined, pointing out that the "unpublished (and unissued) panel decision authored by Judge Suhrheinrich" would have been vacated anyway by the grant of an en banc hearing, and that Senior Judges Suhrheinrich and Siler could not have participated in the en banc hearing "because

B. Judicial Politics in the Supreme Court

As *Grutter* and *Gratz* moved from the Sixth Circuit to the Supreme Court, another procedural anomaly dramatized the political importance of these cases. After the Supreme Court granted certiorari in *Grutter*, it granted an extraordinary motion to grant certiorari in *Gratz* before the Sixth Circuit decided the appeal from the district court.⁶⁹ Granting certiorari in *Gratz* so that *Grutter* would not be decided by itself was transparently actuated by the same motive which Judge Boggs attributed to Chief Judge Martin, namely, affecting the outcome of the cases. Contrasting Chief Justice Rehnquist's majority opinion in *Gratz* with Justice O'Connor's opinion for the Court in *Grutter* illustrates the very different political message which the Court would have sent to the nation if certiorari had been granted only in *Grutter*, and *Gratz* had been left to work its way through the fractured Sixth Circuit.

Proponents of affirmative action wanted the law school case to reach the Supreme Court first, for the same reason that Thurgood Marshall chose *Sweatt v. Painter*⁷⁰ as the first case to challenge *de jure* segregated schools. Marshall knew that the Justices would appreciate the importance of a quality legal education even if equal opportunity at other levels of education would be more abstract to the Justices. The decisive opinion by Justice O'Connor in *Grutter* demonstrates the wisdom of this litigation strategy. Indeed, Justice O'Connor specifically discussed *Sweatt v. Painter*⁷¹ when formulating the essential premise of her opinion that in order for our diverse society to follow its leaders, graduates of our elite

the three Judge panel never reached a decision prior to the en banc Court granting initial en banc review" *Id.* at 617 (citing 28 U.S.C. § 46c (2003), which states that the en banc courts "shall consist of all circuit judges in regular active service . . . except that any senior circuit judge of the circuit shall be eligible to participate . . . as a member of an en banc court reviewing a decision of a panel of which such judge was a member.").

⁶⁹ Linda Greenhouse, *The Supreme Court: Affirmative Action; Justices Look for Nuance in Race-Preference Case*, N.Y. TIMES, Apr. 2, 2003, at A1.

⁷⁰ *Sweatt v. Painter*, 339 U.S. 629 (1950); see also RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 260-84 (1976); JAMES E. ST. CLAIR & LINDA C. GOGIN, *CHIEF JUSTICE FRED M. VINSON OF KENTUCKY: A POLITICAL BIOGRAPHY* 307-22 (2002); JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* 175-95 (1998). The first law school desegregation case was *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

⁷¹ *Sweatt*, 339 U.S. at 629.

institutions of higher education, those elite institutions must be permitted to matriculate a student body that reflects the diversity of their future followers.⁷²

However, the elite nature of the most selective law schools also illustrates the narrowness of *Grutter*'s legal impact. The overwhelming majority of public colleges, universities, graduate schools, and professional schools have open admissions, rendering an affirmative action admissions policy moot at such institutions.⁷³ In a narrow legal sense, then, the result in *Grutter* applies to the extremely small number of students whose applications to an elite post-secondary or post-graduate program are affected by admissions policies containing racial preferences. Many people who rail politically against affirmative action policies will never even apply to such a program, much less fail to be admitted to one because preference was given to a minority applicant. Why, then, did the case create such a pitched, political battle?

The answer, of course, is in the culture wars. Like the battle over the rarely used "partial birth abortion" procedure, the battle over affirmative action in selective post-graduate schools resonates beyond the direct legal impact of a particular judicial decision. Indeed, affirmative action may have a wider legal impact than the legal struggle over reproductive freedom because, if *Roe v. Wade*⁷⁴ were overruled, the states would not be prohibited from legalizing abortion. Instead states would no longer be required to

⁷² See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2341 (2003), which states:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from individuals and institutions with which the law interacts." Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

Id. (internal citations to *Sweatt*, 339 U.S. at 634, omitted); see Nicholas E. Lemann, *Ideas and Trends: Beyond Baake: A Decision That Universities Can Relate To*, N.Y. TIMES, June 29, 2003, sec. 4, at 14.

⁷³ Only twenty percent of four-year colleges and universities use affirmative action in admissions. Robert J. Samuelson, *Affirmative Ambiguity*, WASH. POST, June 18, 2003, at A25.

⁷⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

legalize abortion, and abortion would likely remain legal in several states. Conversely, if the Court had declared that affirmative action violates the Fourteenth Amendment, no state could permit an affirmative action program. Thus, the culture wars that began with the civil rights movement in the fifties continued to write the subtext of this battle in the Supreme Court in 2003.⁷⁵ Not surprisingly, then, the proponents' claims exceeded their victory, and the opponents described their loss as apocalyptic for the same reasons: to use the narrow results in the cases to maximum effect in shaping electoral politics and legislative agendas.

In fact, the result in *Grutter* and *Gratz* is the very narrowly crafted opinion of Sandra Day O'Connor, pithily captured by a headline writer: *Anyone for a Bit of Legal Fudge?*⁷⁶ Justice O'Connor sought to protect affirmative action in admissions at elite schools, particularly law schools, while minimizing the legal implications of the decision for affirmative action in employment, or for desegregation of elementary and secondary schools. Accordingly, the *Grutter* majority embraced the single opinion of

⁷⁵ The acrimonious exchange among the Sixth Circuit judges illustrated that the political tug-of-war over affirmative action was as unseemly as the bare-knuckled fight over the confirmation of Clarence Thomas, which was actuated by the possibility that his confirmation would provide the vote necessary for overruling *Roe v. Wade*. See JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 29 (1994). The day of the decision, the *New York Times* reported that conservatives were now adding opposition to affirmative action to the litmus test for President Bush's next appointment to the Supreme Court. Neil A. Lewis, *The Supreme Court: Court Vacancies; Some on the Right See a Challenge*, N.Y. TIMES, June 24, 2003, at A1.

⁷⁶ See *Anyone For a Bit of Legal Fudge?*, ECONOMIST, June 28, 2003, at 28. Fudge was apparently the goal of the Bush Administration, as well. The President denounced the University of Michigan's admissions policies on television and then filed an amicus brief that drew far less press attention. The government's brief "did not even ask the judges to overturn the *Bakke* decision It was as if the administration had filed a brief denouncing abortion without asking the court to overturn *Roe v. Wade*." Linda Greenhouse, *Bush and Affirmative Action: News Analysis; Muted Call in Race Case*, N.Y. TIMES, Jan. 17, 2003, at A1. The solicitor general, Theodore B. Olson, had a "delicate position" in this case since he was lead counsel in the *Hopwood* case that "shut down affirmative action at the University of Texas." Greenhouse, *supra* note 69, at A1. While Secretary of State Colin Powell publicly supported the University of Michigan, Condoleezza Rice, National Security Advisor, had to publicly renounce leaks that she had played the central role in persuading the President to intervene on the side of the plaintiffs. Brent Staples, *Pondering Condoleezza Rice's Affirmative Action Problem—and Mine*, N.Y. TIMES, Feb. 1, 2003, at A18.

Justice Powell in *Bakke* to forge its majority. The majority embraced Powell's rejection of the 1960s rationale for affirmative action—remedying societal discrimination and reducing the historic deficit of traditionally disfavored minorities in professional schools⁷⁷—and embraced Powell's view which “approved the university's use of race to further only one interest: ‘the attainment of a diverse student body.’”⁷⁸

Exhibiting her well-deserved reputation for narrowing the impact of her opinion, Justice O'Connor held that attaining “a critical mass of minority students”⁷⁹ is a compelling state interest, but reaching that critical mass is

⁷⁷ In *Grutter*, the Court did not embrace the view of Brennan, White, Marshall, and Blackmun in *Bakke* that government can use race to “remedy disadvantages cast on minorities by past racial prejudice.” *Grutter*, 123 S. Ct. at 2335 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 325 (1978)); see also *United States v. St. Louis-San Francisco Ry. Co.*, 464 F.2d 301, 312 (8th Cir. 1972) (Matthes, J., concurring) (“In the final analysis, allegations of reverse discrimination contend only that the hardships accruing from past wrongs should continue to fall exclusively upon those already discriminated against. The answer of that contention is self-evident.”).

⁷⁸ *Grutter*, 123 S. Ct. at 2336 (quoting *Bakke*, 438 U.S. at 311). In the First Amendment context, it is often said that deciding whether the case is governed by the strict scrutiny test dictates the result, because restrictions on speech can rarely pass the most narrowly tailored test. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 385, 421 (2000); *Bd. of Trs. v. Fox*, 492 U.S. 469, 477-79 (1989); *Stromberg v. California*, 283 U.S. 359 (1931); *Schenck v. United States*, 249 U.S. 47 (1919). In *Grutter*, Justice O'Connor rejected that a fortiori reasoning: “Strict scrutiny is not ‘strict in theory, but fatal in fact.’” *Grutter*, 123 S. Ct. at 2338 (quoting *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 237 (1995)). “Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.” *Grutter*, 123 S. Ct. at 2330. Of course, strict scrutiny was originally “fatal in fact” in the First Amendment context; case law held certain types of speech were unprotected by the First Amendment, not sufficiently narrowly tailored. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Unfortunately, however, the Court's effort to bend First Amendment jurisprudence to eradicate child pornography has resulted in strict scrutiny not being “fatal in fact” even in the First Amendment context. See *Osborne v. Ohio*, 495 U.S. 103 (1991); *Martin v. Commonwealth*, 96 S.W.3d 38 (Ky.), cert. denied, 123 S. Ct. 2586 (2003). The Court's decision that deferring to law school admissions officers' “holistic” application of “diversity” can survive the strict scrutiny test further erodes the strict scrutiny test's original purpose.

⁷⁹ *Grutter*, 123 S. Ct. at 2329. Justice Scalia ridiculed this result, saying “that the allegedly ‘compelling state interest’ at issue here is not the incremental ‘educational benefit’ that emanates from the fabled ‘critical mass’ of minority students, but rather Michigan's interest in maintaining a ‘prestige’ law school whose normal admissions standards disproportionately exclude blacks and other minorities.” *Id.* at 2348-49 (Scalia, J., dissenting).

somehow not a quota.⁸⁰ That bit of “legal fudge” was then further limited to the context of elite post-secondary and post-graduate educational programs by the holding that race can be taken into consideration only if the school “engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”⁸¹ This criterion facilitates applying the Court’s rationale to law schools and similarly small post-graduate programs, while making it very difficult to apply it to undergraduate programs—as *Gratz* demonstrates—and virtually impossible to apply to desegregating elementary and secondary schools. The result is to permit affirmative action at only the most elite post-secondary and post-graduate schools and rendering affirmative action unconstitutional in virtually all other contexts.⁸²

In reaching that middle ground, Justice O’Connor “found the sweet spot where the American political consensus abides.”⁸³ Justice O’Connor paid particular homage to the plethora of amicus briefs which supported affirmative action at “the service academies and . . . our country’s other most selective institutions.”⁸⁴ The overwhelming support of affirmative

⁸⁰ *Id.* at 2329-30.

⁸¹ *Id.* at 2330.

⁸² The Court further narrowed its holding by deferring to the special expertise of the educational institution in selecting its diverse student body, thereby specifically narrowing the legal impact of the holding to affirmative action at the elite post-secondary and post-graduate programs which motivated the court to reach this result in the first place. The majority held that “universities occupy a special niche in our constitutional tradition.” *Id.* at 2339. The Court therefore held that the “Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.” *Id.* Justice Thomas stated: “Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of ‘strict scrutiny.’” *Id.* at 2350 (Thomas, J., dissenting).

⁸³ See Keller, *supra* note 33, at A15.

⁸⁴ *Grutter*, 123 S. Ct. at 2340. There were a total of 112 amicus briefs filed, with 78 in support of affirmative action. Linda Greenhouse, *Can the Justices Buck What the Establishments Backs?*, N.Y. TIMES, Mar. 3, 2003, sec. 4, at 4.

What is most striking is the range and sheer weight of the establishment voices on the affirmative action side. Not only the alma maters of every member of the court, but dozens of Fortune 500 companies and, most unexpectedly, 21 retired generals and admirals, including three former military academy superintendents, have signed briefs urging the justices to leave the door open to race-conscious policies in university admissions. One commentator’s explanation for the majority empathizing with affirmative

action by big business and the military brass offers a fascinating insight into the evolution of our governing class, as markets have changed to “today’s increasingly global marketplace.”⁸⁵ Today managers understand that the diversity of their customers mandates diversity among their managers and the military understands that the diversity of its enlistees demands diversity among its officers. Consequently, the institutions that were most resistant to change in the 1950s and 1960s have now embraced affirmative action.⁸⁶

Significantly, the Court rejected the position advanced by the second Bush Administration, which argued that affirmative action could be promoted—as it was by Governor Bush in Texas—with a law “to guarantee admission to all students above a certain class-rank threshold in every high school in the State.”⁸⁷ These “percentage plans” guarantee admission to state universities of all students who graduate at the top of their high school class, but these percentage plans would increase the number of minorities in those universities only if the state’s high schools were de facto racially segregated. Thus, the Bush Administration’s proposal rested upon the unintended irony that limiting the ability of public school districts to remedy de facto segregation resulting from housing patterns would provide a means for promoting minority high school graduates to the state’s better universities.⁸⁸

Indeed, the demise of efforts to desegregate elementary and secondary education provide a disturbing prediction for the portion of the Court’s

action only at elite law schools is that the Court is populated with individuals who benefited from affirmative action in law schools and in Supreme Court appointments. Adam Cohen, *Why Justice O'Connor Could Be Affirmative Action's Unlikely Savior*, N.Y. TIMES, Apr. 6, 2003, at 12.

⁸⁵ *Grutter*, 123 S. Ct. at 2329.

⁸⁶ Conversely, Justice Thomas asserted that the demise of affirmative action would make it more difficult to defend other preferential admissions, such as family legacies. *Id.* at 2360 n.10 (Thomas, J., dissenting). See also Maureen Dowd, *The Class President*, N.Y. TIMES, Jan. 22, 2003, at A21 (commenting on President Bush’s obtuseness to affirmative action for family legacies).

⁸⁷ *Grutter*, 123 S. Ct. at 2345.

⁸⁸ Benjamin Forest, *Affirmative Action—And Reaction; A Policy That Depends on Segregation*, N.Y. TIMES, Mar. 29, 2003, at A11 (“This claim ignores a forgotten reality of the Texas plan: access and diversity in universities will come at the price of continued segregation in high schools.” It “simply replaces race consciousness in admissions with the race consciousness of segregation” in secondary schools. Whether the differences in test scores are caused by race, economic circumstances or family structure, “in practice it means that only highly segregated high schools will have a significant number of minority students among their top 10 percent.”).

opinion holding that “race-conscious admissions policies must be limited in time.”⁸⁹ The Court basically gave higher education one more generation to use race-conscious admissions before race-neutral admissions would be the command of the Fourteenth Amendment. Just as the Court tired of desegregating elementary and secondary schools when the remedy of cross-district busing encroached upon white suburbia,⁹⁰ Justice O’Connor’s majority flatly states that it will tire of affirmative action—even at elite law schools—after another twenty-five years.⁹¹

Because the gap in standardized tests between the races is widening, rather than narrowing, due in part to the abandonment of desegregation in elementary and secondary schools, it is unlikely that a statistically significant number of minorities will be performing better on those standardized tests twenty-five years from now than they are today.⁹² What will the Court do then? After all, if the goal of racial diversity in admissions is intrinsically a compelling state interest, not a remedy for past discrimination, why must it expire in twenty-five years?

CONCLUSION

The Supreme Court’s affirmative action decisions should be analyzed in the social and political contexts in which they were rendered. Indeed, *Grutter* and *Gratz* are quintessential examples of deTocqueville’s observation that, in the United States, political issues often become legal issues to be resolved by the courts.⁹³

The politics of slavery and race have profoundly effected the nation’s political structure. This effect can be seen in the insertion of the “Three-

⁸⁹ *Grutter*, 123 S. Ct. at 2330.

⁹⁰ See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 401 U.S. 1 (1971). Compare *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358 (W.D. Ky. 2000) (holding that a desegregation decree should be dissolved because the goals of the decree had been accomplished) with *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 312 (4th Cir. 2001) (ruling that “the ‘end purpose’ of federal intervention to remedy segregation has been served”).

⁹¹ Justice Ginsburg wrote separately to emphasize that, while all affirmative action plan must someday sunset, the majority’s prediction that affirmative action would be unnecessary after twenty five years may be unduly optimistic.

⁹² Steven A. Holmes & Greg Winter, *Ideas & Trends: Test of Time*, N.Y. TIMES, June 29, 2003, sec. 4, at 1; Arthur Levine, *American Education: Still Separate, Still Unequal*, L.A. TIMES, Feb. 2, 2003, at M1.

⁹³ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 99-104 (George Lawrence trans., 1969).

Fifths Clause” in the original Constitution,⁹⁴ in the Civil War Amendments,⁹⁵ and in the demise of both the Reconstruction⁹⁶ and the Jim Crow era. It is also seen in the Civil Rights movement of the 1950s and in the current debate over affirmative action.

The political divisions in American society over affirmative action were reflected in the fissures in both the Sixth Circuit and the Supreme Court. The judges of the Sixth Circuit publicly split, with the dissenters accusing the majority of manipulating the Court’s procedures to create the split in circuits which resulted in certiorari being granted in an affirmative action case for the first time in twenty-five years. The equally fractured Supreme Court upheld affirmative action in principle in the law school case, while striking down its application in the undergraduate case. In the final analysis, the majority opinion in *Grutter* was cobbled together to muster a transient majority, to accomplish a transient goal for a current political constituency.

⁹⁴ GARY WILLS, *NEGRO PRESIDENT, JEFFERSON, AND THE SLAVE POWER* (2003).

⁹⁵ JAMES M. MCPHERSON, *ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION* (1992).

⁹⁶ WOODWARD, *supra* note 24.

